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No. 90-380

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

DELAWARE & HUDSON RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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1. By sidestepping the central issue raised in the Petition ("Pet."), the Brief in Opposition ("Opp.") of Delaware and Hudson Railway Company ("D&H") underscores the need for this Court to review the seriously flawed decision of the court of appeals. Petitioner Consolidated Rail Corporation ("Conrail") asks the Court to resolve this question: Does Section 2 of the Sherman Act, 15 U.S.C. § 2, require a vertically integrated firm that allegedly has monopoly power and that buys components of its output from non-integrated competitiors only when the cost of buying a component is less than the integrated firm's cost of making that component, to sacrifice profits and efficiency by purchasing the competitor's component when it costs more? D&H does not question the importance of this issue or that it is ripe for review. Nor does D&H present any credible support for the decision of the court of appeals that Section 2 can compel Conrail to

purchase D&H's service even when doing so would be more expensive than providing that service itself.

2. D&H seeks to justify the decision below by turning on its head this Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). D&H incorrectly maintains that *Aspen* supports the court of appeals' remarkable proposition that Section 2 imposes liability whenever a monopolist's conduct harms only a competitor, whether or not that conduct harms competition, i.e., consumers.[1] The central message of *Aspen*, however, is that a Section 2 plaintiff can establish liability only if it shows that defendant's conduct impaired competition in an unnecessarily restrictive way—" 'on some basis other than efficiency.' " *Aspen*, 472 U.S. at 605 (quoting R. Bork, *The Antitrust Paradox* 138 (1978)). Indeed, it is a principle of long standing that "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.' " *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 478 (1977) (emphasis in original; *quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Thus, the court of appeals radically departs from, rather than builds upon, the Court's teaching in *Aspen*.

D&H also seeks (Opp. at 16) to draw a parallel with *Aspen* by asserting that Conrail's undisputed justification of short-run profit maximization for its make-or-buy policy somehow equates to the complete lack of justification offered by Skiing Co. for conduct that sacrified short-run

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[1] Recognizing that *Aspen* cannot be contorted in this way, D&H makes a passing attempt to show evidence in the record of harm to consumers from Conrail's make-or-buy policy. Opp. at 16-17 & 2A-4A. However, in the very example to which D&H refers, Conrail followed its uniform policy: In response to a request from Canadian National Railway proposing to lower a newsprint rate, Conrail concurred in the lower rate on the routes where it had a direct connection with Canadian National because that conduct maximized Conrail's profit. Thus, consumers could receive the lower rate by shipping via Conrail; they could not receive the lower rate on routes including D&H because D&H was unwilling to reduce its divisions.

benefits. *See Aspen*, 472 U.S. at 608-11. But even the court of appeals acknowledged that "[t]he fact that profit maximization is a goal of the make or buy policy provides support for an argument that the policy is a legitimate practice . . . ." Pet. App. at 7a.[2]

Finally, D&H argues that this case is like *Aspen* because it also involves a situation where the defendant made "an important change in a pattern of distribution." Opp. at 16 (quoting *Aspen*, 472 U.S. at 603). D&H ignores that, in *Aspen*, the Court considered this change important because the earlier pattern of distribution "had originated in a competitive market." *Aspen*, 472 U.S. at 603. D&H does not dispute that the historic divisions of revenue among railroads, which it seeks to perpetuate, originated under a regulatory scheme subsequently repudiated by both Congress and the Interstate Commerce Commission. *See* Pet. at 5-8.

3. D&H also seeks to harmonize the court of appeals' erroneous resolution of the question left open in *Aspen*—"whether non-exclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anti-competitive purpose," 472 U.S. at 611 n.44—with the contrary decisions from other courts of appeals discussed in the Petition (pp. 18-20). That effort is unavailing. Nothing D&H says can alter the court of appeals' conclusion that legitimate, profit-maximizing conduct can nevertheless run afoul of Section 2 if there is evidence of anti-competitive intent. Nor can D&H escape the direct conflict between the court of appeals here and those courts that have held that evidence of intent is irrelevant once

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[2] It is firmly established that profit maximization is a legitimate business justification as a matter of law, even if pursued by a firm with monopoly power and even if the firm hopes that its conduct will take business away from competitors. *See* Pet. at 18-21; *United States Football League v. National Football League*, 842 F.2d 1335, 1361 (2d Cir. 1988) ("[A] monopolist . . . is free to set as its legitimate goal the maximization of its own profits . . . .").

the court determines that the conduct at issue does not harm competition.

4. D&H's defense of the court of appeals' application of the "essential facilities" doctrine also points up the need for this Court's review. According to D&H, the firm controlling a facility deemed "essential" must offer access on reasonable terms, with "reasonable" defined "in an economic sense viewed from the point of view of the competitor." Opp. at 28. Under this formulation, it is irrelevant that furnishing access on terms reasonable from D&H's point of view would require Conrail to subsidize D&H and sacrifice profits.[3] This application of the "essential facilities" doctrine, if allowed to stand, would provide an escape hatch for plaintiffs who cannot establish monopolization under traditional Section 2 principles.

5. Throughout its Opposition, D&H intimates that there are disputed factual issues as to Conrail's intent that both justify the court of appeals' decision and warrant denial of Conrail's Petition. But the facts material to the legal issue presented in the Petition are undisputed. D&H admits that Conrail applied the make-or-buy policy "so Conrail could maximize its profits." Opp. at 22. Moreover, as the district court recognized, D&H has never been able

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[3] D&H relies on *Consolidated Gas Co. v. City Gas Co.*, 655 F. Supp. 1493 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir. 1989), *aff'd en banc*, No. 87-6109, slip op. (11th Cir. Sept. 19, 1990) (to be reported at 912 F.2d 1262). The serious misapplication of Section 2 by the court of appeals in *Consolidated Gas*, like the court of appeals here, further underscores the need for this Court to address the issues raised by the Petition. In his dissent from the court's *en banc* affirmance, Chief Judge Tjoflat recognized the potential for serious economic and legal dislocations when the "essential facilities" doctrine is interpreted to condemn conduct that is legitimate under traditional Section 2 analysis. Slip op. at 5176-84. He also recognized the extraordinary problems posed in fashioning a remedy when a monopolist offers access to the "essential" facility on "unreasonable" terms. *Id.* at 5183, 5196-206. Indeed, defining reasonable terms of access "forces the courts to adopt the role of a regulatory agency, an agency charged moreover, with an impossible task and facing a set of never-ending problems." *Id.* at 5206.

to identify an instance in which Conrail refused to concur in joint rates with D&H where concurrence would have been more profitable for Conrail than nonconcurrence. Pet. App. at 23a. Thus, no additional factual development by the district court could illuminate further the legal issues that Conrail's Petition raises.[4]

The court of appeals' decision that Conrail's application of its make-or-buy policy—a policy that concededly maximizes profits in the short run—could violate Section 2 of the Sherman Act departs markedly from the decisions of this Court and the other courts of appeals. Accordingly, Conrail's Petition should be granted.

Respectfully submitted,

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[4] D&H refers to the court of appeals' mischaracterization of the deposition testimony of a Conrail official to argue that there was "evidence that Conrail elected to forego short-run benefits." Opp. at 17. Even if accurately interpreted—which it was not, *see* Pet. at 10-11 n.17—this statement of intent does not constitute conduct, nor does it rebut the undisputed record showing Conrail's unwavering application of its make-or-buy policy.